Pandit (Migration) [2024] AATA 145 (10 January 2024)

1.

2.

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Asim Pandit
REPRESENTATIVE:	Mr Ashutosh Sharma (MARN: 1682588)
CASE NUMBER:	2308545
HOME AFFAIRS REFERENCE(S):	BCC2021/1723604
MEMBER:	P. Maishman
DATE:	10 January 2024
PLACE OF DECISION:	Perth
DECISION:	The Tribunal remits the application for a Skilled (Provisional) (Class VC) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 485 (Temporary Graduate) visa: • Public Interest Criterion 4020 for the purposes of cl 485.216(1) of Schedule 2 to the Regulations

Statement made on 10 January 2024 at 2:29pm

CATCHWORDS
MIGRATION – Skilled (Provisional) (Class VC) visa – Subclass 485 (Temporary Graduate) – bogus document – PTE Academic Test Score report – relevant visa application withdrawn – decision under review remitted
3.
LEGISLATION
Migration Act 1958 (Cth), s 65
Migration Regulations 1994 (Cth), Schedule 2, cl 485.216; Schedule 4, PIC 4020

CASES
Arora v MIBP [2016] FCAFC 35
Batra v MIAC [2013] FCA 274
Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 1 June 2023 to refuse to grant the applicant a Skilled (Provisional) (Class VC) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).

5. The applicant applied for the visa on 3 September 2021. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl 485.216(1) of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations) because the delegate says there is evidence the applicant gave the Minister a bogus document in relation to a visa which the applicant held in the 12 months before this application.

6. The applicant appeared before the Tribunal on 8 January 2024 to give evidence and present arguments.

7. The applicant was represented in relation to the review.

8. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

9. The Tribunal had before it a copy of the Department's file.

10. The applicant gave the Tribunal a copy of the delegate's decision record which outlines the history of the application. Relevantly, the delegate says the applicant applied for a Student (Subclass 500) visa on 4 June 2021 and submitted a PTE Academic Test Score report indicating he achieved an overall score of 61. The Department conducted internal checks to confirm the authenticity of the PTE Academic Test Score report and it was discovered the applicant's correct score was 44.

11. The applicant gave oral evidence that he fabricated his English test record to impress his father. He had no intention to provide the fabricated document to the Department however it got mixed up in the documents he gave to his migration agent and the bogus document was ultimately given to the Department. When the Department invited the applicant to comment on the authenticity of the document he withdrew his Student (Subclass 500) visa application.

12. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl 485.216(1) for the grant of the visa. Broadly speaking, this requires that:

    - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and

    - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and

- the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
- neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).

13. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

14. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s 5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.

15. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.

16. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.

17. The applicant does not dispute that he changed the score result on his English Language Test report, as described by the delegate. The Tribunal is satisfied on the evidence that the document given to the Department in support of his Student (Subclass 500) visa application on 4 June 2021 was altered by the applicant and that he was not authorised to do so by the issuing authority. The Tribunal is satisfied the document is a 'bogus document' as defined in s 5(1) of the Act.

18. The Tribunal examined the Department's records in relation to the applicant's visa history. In the 12 months before making this visa application, the applicant held a previous student visa which expired on 10 March 2021.

19. The 'bogus document' that the applicant gave to the Department on 4 June 2021 was not in relation to the Student visa he held until 10 March 2021.

20. The Department's records clearly show the applicant withdrew his 4 June 2021 application for the Student (Subclass 500) visa. There is no evidence before the Tribunal the applicant at any time held the Student (Subclass 500) visa for which he applied on 4 June 2021.

21. The ‘bogus document’ given to the Department was not provided to the Department in relation to this Skilled (Provisional) (Class VC) application or a visa that the applicant held in the 12 months before the application for the Skilled (Provisional) (Class VC) visa was made.

22. Therefore, the applicant meets PIC 4020(1).

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(1)?

23. PIC 4020(2) requires the Tribunal to be satisfied that the applicant and each member of the family unit have not been refused a visa because of a failure to satisfy PIC 4020(1) in the period commencing 3 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2AA).

24. There is no evidence before the Tribunal to demonstrate that the applicant or any member of his family unit (as defined in reg 1.12) have been refused a visa in the relevant period because of a failure to satisfy PIC 4020(1).

25. Therefore, PIC 4020(2) is met.

Has the applicant satisfied the identity requirements?

26. PIC 4020(2A) requires an applicant satisfy the Tribunal as to his or her identity.

27. PIC 4020(2A) requires an applicant satisfy the Tribunal as to his or her identity. There is no evidence before the Tribunal to suggest that there is an issue with the applicant’s identity.

28. Therefore, the applicant meets PIC 4020(2A).

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(2A)?

29. PIC 4020(2B) requires that neither the applicant nor any family unit member have been refused a visa because of a failure to satisfy the identity requirements in PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2BA).

30. There is no evidence the applicant or any member of the family unit (as defined in r.1.12) have been refused a visa in the relevant period because of a failure to satisfy cl.4020(2A)

31. Therefore PIC 4020(2B) is met.

32. On the basis of the above, the applicant satisfies PIC 4020 for the purposes of cl 485.216(1).

DECISION

33. The Tribunal remits the application for a Skilled (Provisional) (Class VC) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 485 (Temporary Graduate) visa:

    - Public Interest Criterion 4020 for the purposes of cl 485.216(1) of Schedule 2 to the Regulations.

P. Maishman
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:

(a) the application for the visa; or

(b) a visa that the applicant held in the period of 12 months before the application was made.

(2) The Minister is satisfied that during the period:

(a) starting 3 years before the application was made; and

(b) ending when the Minister makes a decision to grant or refuse to grant the visa;

the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).

(2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.

(2A) The applicant satisfies the Minister as to the applicant's identity.

(2B) The Minister is satisfied that during the period:

(a) starting 10 years before the application was made; and

(b) ending when the Minister makes a decision to grant or refuse to grant the visa;

neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).

(2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.

(3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.

(4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:

(a) compelling circumstances that affect the interests of Australia; or

(b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;

justify the granting of the visa.

(5) In this clause:

information that is ***false or misleading in a material particular*** means information that is:

(a) false or misleading at the time it is given; and

(b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

…

Migration Act 1958

s 5 Interpretation

(1) In this Act, unless contrary intention appears:

…

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

(a) purports to have been, but was not, issued in respect of the person; or

(b) is counterfeit or has been altered by a person who does not have authority to do so; or

(c) was obtained because of a false or misleading statement, whether or not made knowingly.

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